75-5792

IN THE

SUPREME COURT OF THE UNITED STATES

November Term, 1975

****

THOMAS LEE KING and JOSEPH LEE KING,
Petitioners,

v.

STATE OF NORTH CAROLINA,
Respondent.

****

BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CITATIONS

Cases:

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STATE OF NORTH CAROLINA,
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OPINION BELOW

The opinion of the Supreme Court of North Carolina was rendered and filed in that Court on June 26, 1975, bearing Opinion No. 8 and is reported in 215 SE 2d 540. A copy of the opinion has, heretofore, been submitted to this Court by Petitioners.

JURISDICTION

The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. Sec. 1257(3).

QUESTIONS PRESENTED

I.

HAVE THE PETITIONERS BEEN DEPRIVED OF THEIR CONSTITUTIONAL RIGHT TO BE FREE FROM THE INFLICTION OF CRUEL AND UNUSUAL PUNISHMENTS, IN VIOLATION OF THE EIGHTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES BY VIRTUE OF THE SUPREME COURT OF NORTH CAROLINA'S INTERPRETATION OF SECTION 14-17 OF THE NORTH CAROLINA GENERAL STATUTES AFTER THE DECISION OF THE SUPREME COURT OF THE UNITED STATES IN THE CASE OF FURMAN v. GEORGIA, 408 US 238?

II.

HAVE THE PETITIONERS BEEN DEPRIVED OF THEIR CONSTITUTIONAL RIGHT TO BE FREE FROM THE INFLICTION OF CRUEL AND UNUSUAL PUNISHMENTS, IN VIOLATION OF THE EIGHTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES BY VIRTUE OF THEIR BEING SENTENCED TO DEATH UNDER THE NORTH CAROLINA GENERAL STATUTES SECTION 14-17?

III.

HAVE THE PETITIONERS BEEN DEPRIVED OF THEIR CONSTITUTIONAL RIGHT OF DUE PROCESS OF LAW, IN VIOLATION OF THE FIFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES BY VIRTUE OF THE CONSOLIDATION FOR TRIAL OF THE CHARGES AGAINST PETITIONER THOMAS LEE KING WITH THOSE AGAINST PETITIONER JOSEPH LEE KING?

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

AMENDMENT V.

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

AMENDMENT VIII.

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

STATUTORY PROVISIONS INVOLVED

I.

N.C.G.S. 14-17 prior to its Amendment, which was effective April 8, 1974:

Murder in the first and second degree defined; punishment. - A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony,

shall be deemed to be murder in the first degree and shall be punished with death: Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the Court shall so instruct the jury. All other kinds of murder shall be deemed murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the State's prison.

II.

N.C.G.S. 15-152: (1965)

Separate counts; consolidation. - When there are several charges against any person for the same act or transaction or for two or more acts or transactions connected together, or for two or more transactions of the same class of crimes or offenses, which may be properly joined, instead of several indictments, the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the Court will order them to be consolidated: Provided, that in such consolidating cases the defendant shall be taxed the solicitor's full fee for the first count, and a half fee for only one subsequent count upon which conviction is had or plea of guilty entered: Provided, this section shall not be construed to reduce the punishment or penalty for such offense or offenses.

STATEMENT OF CASE

The petitioners Thomas Lee King and Joseph Lee King were tried before The Honorable Fred H. Hasty and a jury at the July 15, 1974, Criminal Session of the Gaston County Superior Court Division of the General Court of Justice for the Twenty-Seventh Judicial District of North Carolina, upon indictments charging each of them with robbery with a dangerous weapon and first degree murder of Leo Davis, both offenses occurring on or about the 16th day of February, 1974. The Petitioners entered a plea of not guilty to each charge. The jury, on the 31st day of July, 1974, returned verdicts of guilty in all four cases. The Court sentenced both defendants to death by the inhalation of lethal gas in the cases against them charging them with first degree murder and imposed no judgment in the cases charging an armed robbery. Both defendants gave notice of appeal and the Supreme Court of North Carolina upheld the convictions.

STATEMENT OF FACTS

The respondent, State of North Carolina, agrees with those facts pertinent to these petitioners' rights to be adjudicated in the Supreme Court of the United States as set forth in that opinion of the Supreme Court of North Carolina which is appended to the petitioners' Petition for Writ of Certiorari and heretofore filed in this Court.

ARGUMENT

A. STATE'S RESPONSE TO ARGUMENTS NOS. I AND II RAISED BY PETITIONERS.

The petitioners raise the contention that their constitutional right to be free from the infliction of cruel and unusual punishments protected by the Eighth Amendment to the Constitution of the United States have been deprived by virtue of the Supreme Court of North Carolina's interpretation of Section 14-17 of the North Carolina General Statutes after the decision of the Supreme Court of the United States in the case of Furman v. Georgia, 408 US 238. Additionally, under their second question, the petitioners contend that their constitutional rights have been deprived by the denial of their freedom from the infliction of cruel and unusual punishments in violation of the Eighth Amendment to the Constitution of the United States by virtue of their being sentenced to death under North Carolina General Statutes Section 14-17.

The State of North Carolina, among other cases, has pending for consideration by the Supreme Court of the United States, its case of Kelly Dean Sparks v. State of North Carolina designated in this Court as 74-669. In that brief now before this Court, under that argument designated as No. III, there is discussed in detail the rationale of the decisions in this area by the Supreme Court of North Carolina and its power to perform what the petitioners call a legislative function in the striking out of a portion of a State Statute in conflict with the Furman (supra) opinion of this Court. Additionally, under that argument designated as No. III of the State of North Carolina's Sparks (supra) brief, there is a lengthy discussion of the death penalty, its application, and its cruel and unusual aspects. This brief and the arguments presented therein are attached hereto and specifically incorporated by the State of North Carolina as its response to those questions designated as No. I and No. II

as raised in this Court by the petitioners.

B. STATE'S RESPONSE TO ARGUMENT DESIGNATED NO. 3 BY PETITIONERS

The petitioners' third argument for the granting by this Court of their Petition focuses upon certain alleged prejudicies caused to their cases by virtue of their being forced to have their guilt or innocence adjudicated in a joint trial. The State of North Carolina, in opposition to this argument, would refer this Court to its response as contained in Argument I of its brief heretofore filed in the Supreme Court of North Carolina entitled State v. King, which Argument is hereby reaffirmed in the Supreme Court of the United States. The State's brief containing this response is attached hereto and made a part hereof.

CONCLUSION

The State of North Carolina, respondent, respectfully requests of this Court that it deny the petitioners' Petition for Writ of Certiorari to the Supreme Court of North Carolina.

This the 17 day of January, 1976.

Respectfully submitted,

RUFUS L. EDMISTEN
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Assistant Attorney General

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he is an Assistant Attorney General licensed to practice law in the State of North Carolina and in the United States Supreme Court.

That on October 6, 1976, he served a copy of the attached RESPONSE OF THE STATE OF NORTH CAROLINA TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA to the person hereinafter named, at the place and address stated below by depositing said envelope and its contents in the United States mails, postate prepaid, at Raleigh, North Carolina:

Mr. Frank Patton Cooke
Attorney at Law
Commercial Building
Gastonia, North Carolina 28052

This the 6th day of October, 1976.

Thomas B. Wood
Assistant Attorney General
North Carolina Department of Justice
P. O. Box 25201
Raleigh, North Carolina 27611
Telephone: (919) 829-3316

NO. 8 TWENTY-SEVENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

Spring Term 1975

****

STATE OF NORTH CAROLINA	)	
	)	
v	)	From Gaston
	)	
THOMAS LEE KING AND JOSEPH KING	)	

****

BRIEF FOR THE STATE

****

QUESTIONS INVOLVED

I.

DID THE TRIAL COURT BELOW COMMIT PREJUDICIAL ERROR IN ORDERING THE CONSOLIDATION OF THE CHARGES AGAINST JOSEPH KING WITH THOSE OF THE DEFENDANT, THOMAS LEE KING?

II.

DID THE TRIAL COURT BELOW COMMIT PREJUDICIAL ERROR IN PERMITTING THE STATE TO EXTRACT BLOOD AND HAIR FROM THE DEFENDANTS, JOSEPH KING AND THOMAS LEE KING AND IN ADMITTING INTO EVIDENCE COMPARISONS OF SAID BLOOD AND HAIR WITH BLOOD ALLEGEDLY FOUND AT THE SCENE OF THE CRIME AND TESTIMONY WITH RELATION THERETO?

III.

DID THE TRIAL COURT COMMIT PREJUDICIAL ERROR IN FINDING THE WITNESSES OFFERED BY THE STATE TO BE EXPERTS IN THEIR RESPECTIVE FIELDS IN THE PRESENCE OF THE JURY AND IN REFERRING TO THEM AS SUCH IN ITS CHARGE?

IV.

DID THE TRIAL COURT COMMIT PREJUDICIAL ERROR IN ADMITTING INTO EVIDENCE A HAMMER FOUND BY OFFICERS SOME DISTANCE FROM THE SCENE OF THE CRIME AND AT A LATER TIME AND IN PERMITTING TESTIMONY BY WITNESSES WITH RELATION THERETO?

V.

DID THE TRIAL COURT BELOW COMMIT ERROR WHEN IT DID NOT RESTRICT THE ADMISSIBILITY OF EVIDENCE COMPETENT AGAINST ONE DEFENDANT BUT NOT THE OTHER DEFENDANT, AND BY ALLOWING INCOMPETENT EVIDENCE TO BE INTRODUCED?

VI.

DID THE TRIAL COURT COMMIT ERROR IN CHARGING THE JURY:

(a) THAT IT SHOULD CONSIDER THE CRIME OF ATTEMPTED ROBBERY IN DETERMINING THE GUILT OR INNOCENCE OF MURDER WITHOUT IN ANY WAY DEFINING THE CRIME OF ATTEMPTED ROBBERY?

(b) IN RECAPITULATING THE EVIDENCE IN SUCH A MANNER SO AS TO INDICATE A BELIEF IN THE VERACITY OF THE STATE'S CASE AND A DISBELIEF IN THE DEFENDANT'S CASE?

VII.

DID THE TRIAL COURT BELOW COMMIT PREJUDICIAL ERROR IN DENYING THE DEFENDANTS' MOTIONS FOR MISTRIAL, DISMISSAL, AND MOTIONS TO SET ASIDE THE VERDICTS?

STATEMENT OF THE CASE

This is a criminal action wherein the defendants, Thomas Lee King and Joseph King were charged in indictments with the crimes of robbery with a dangerous weapon and first degree murder of Leo Davis, both offenses occurring on or about the 16th day of February, 1974. The trial was held at the July 15, 1974 Criminal Session of the Gaston County Superior Court Division for the General Court of Justice for the 27th Judicial District before The Honorable Fred Hasty, Judge Presiding and a jury.

The defendants entered pleas of not guilty to each charge and the jury, on the 31st day of July, 1974, returned verdicts of guilty in all four cases. The Court sentenced each defendant to death by the inhalation of lethal gas in the cases against them charging them with first degree murder, and imposed no judgment in the cases of armed robbery. The defendants, thereupon, gave notice of appeal to the North Carolina Court of Appeals.

STATEMENT OF FACTS

The State would substantially agree with the facts as presented in the defendant-appellants' briefs and will, therefore, reiterate here only such facts as will be pertinent to its responses to the questions presented upon these appeals.

ARGUMENTS

I.

THE TRIAL COURT BELOW DID NOT COMMIT PREJUDICIAL ERROR IN ORDERING THE CONSOLIDATION OF THE CHARGES AGAINST JOSEPH KING WITH THOSE OF THE DEFENDANT, THOMAS LEE KING.

Assignments of Error Nos. 1 (R p 609); 6 (R p 610); 82 (R p 615); 93 (R p 616); 94 (R p 616); 109 (R p 618); 111 (R p 619); 84 (R p 615)

Exceptions Nos. 1 (R p 2); 6 (R p 51); 82 (Rpp 315-316); 84 (R p 499); 93 (R p 519); 94 (R p 315); 109 (R p 519); 111 (R p 575)

IV.

THE TRIAL COURT DID NOT COMMIT PREJUDICIAL ERROR IN ADMITTING INTO EVIDENCE A HAMMER FOUND BY OFFICERS SOME DISTANCE FROM THE SCENE OF THE CRIME AND AT A LATER TIME AND IN PERMITTING TESTIMONY BY WITNESSES WITH RELATION THERETO.

Assignments of Error Nos. 8, 12, & 13 (R p 611); 9 (R p 611); 74 (R p 614); 82 & 83 (R p 615);
Exception Nos. 8 & 9 (R p 125); 12 & 13 (R p 137); 74 (R p 256); 82 & 83 (R p 256)

The State will initially respond to the defendants' contentions that the trial Court committed prejudicial error when it overruled Judge Grist's previous Order consolidating the trial of the cases against the co-defendants, father and son.

This response can be more effectively made by excerpting the previous Order issued by Judge Grist and the pertinent findings promulgated by him that formed its content. At page 27 of the record wherein certain portions of the Court's Order are set forth, we find the following:

> "That the matter is ordered held for further consideration in the event that the cases are unable to be heard as hereafter set forth."
>
> "That the State has indicated that there will probably not proceed in both cases at the same term and counsel for the defendant, Joe King, Mr. Robert H. Forbes, has indicated he would likewise move that the matters not be consolidated for trial."
>
> "The Court orders that the State be required to elect as to which case it desires to try and that said case be placed on the calendar for trial in Gaston County on July 15, 1974."

A reading of the entire Order indicates:

(1) That the Court understood that the State had determined that it wanted to proceed against each defendant separately; and

(2) To clarify which case was to be tried first, the Court ordered that the State be required to elect which case it desired to try.

Effectively, therefore, the Court's Order did not affirmatively state that the defendants should be tried separately, but only that if, (as was their announced intention), the State decided to proceed separately against each defendant, it should elect what case it decided to try first. The earlier Order rendered by Judge Grist, contained nothing that would not be consonant with a discretionary Order by a succeeding Judge presiding in the case that allowed the consolidation of the two cases. This view is clearly supported when it is considered that the State cured the indecision to which the original Order was addressed by moving that the four cases against the two defendants be consolidated for trial.

When the Order of Judge Grist is considered in its proper context, such Order did not recognize the need for separate trials as the defendants contend, but plainly was an attempt by the Court to provide what it supposed both the State and the defendants had openly desired - separate trials for each defendant. In this regard, the Court must have been mistaken for the State later moved for consolidation of the cases and the succeeding Judge cleared up this misinterpretation by allowing the State's motion. In summary, therefore, the Order by Judge Grist would seem to be an effort on his part to clear up the question as to who was to be tried first rather than an Order speaking against the consolidation of the trials.

Although involving a factually dissimilar situation, a basically similar principle was involved and condoned by the Supreme Court of North Carolina in the case of Alexander v. Brown, 236 NC 212, 72 SE 2d 522. In that case, it was stated by the Court that, when it is impossible to tell whether an Order striking certain paragraphs of a complaint was based on irrelevancy or improper reference to another paragraph, another Superior Court Judge may allow an amendment setting out the same facts in full instead of by reference, the matter being relevant. 2 Strong, N. C. Index 2d, Criminal Law, Sec. 9 at page 448. The argument could be advanced, based upon the reasoning in this case, that Judge Hasty was simply modifying an earlier interlocutory Order upon the emergence of changed circumstances (i.e. subsequent wish of the State to consolidate the cases for trial) as was approved in Calloway v. Ford Motor Company, 281 NC 296, 189 SE 2d 484.

The defendants make the further arguments:

(1) That they were undifferentiated during the trial and that evidence inadmissible as to one and applicable only to the other was heedlessly admitted.

(2) That because they were father and son, they were unnecessarily tied together in both name and guilt in the minds of the jury;

(3) That the identification by the victim, Missouri Davis, of the tatoos on the hand of Joseph King, the dark blood-stained coat he wore found in the Joseph King home, the hammer identified only in the hands of Joseph King and the scratches and bruises found on him prejudiced his co-defendant, Thomas Lee King, against whom such evidence would not be admissible. In this regard, the defendants further complained that the remoteness of the location of a hammer that was found from the crime scene and the time sequence as to when it was found and its identification made its admission prejudicial.

The State would respond to these arguments by averring to the fact that the interests of the two defendants, father and son, were not antagonistic to each other. Certainly, neither defendant made a statement inculpatory of the other. And, if it be considered that there was insufficient evidence to convict one of the defendants, such acquittal would not more strongly implicate the other. Further, the introduction of the evidence of the coat, and the headpiece containing hair and blood and other evidence which connected the defendant, Joseph King, to the crime could not have prejudiced his co-defendant, Thomas Lee King, when the care that the presiding Judge took in assuring that the jury understood that separate defendants were on trial and that separate issues of guilt were involved is considered. In this regard, let us examine the Court's charge at page 520 of the record:

> "Members of the Jury, as you are aware, we have, for the past two weeks and two days been hearing four criminal cases which were consolidated for the purpose of trial. It now becomes my duty to charge you with instructions with which you are to be guided in arriving at your verdicts in these cases.
>
> In two of the cases, the defendant, Thomas Lee King, is charged in Bills of Indictment charging him with Robbery with a Dangerous Weapon and Murder in the First Degree. These cases are numbered 74 CR 4355 and 74 CR 4357, respectively. In the other two cases, the defendant, Joseph King, is likewise charged in Bills of Indictment with Robbery with a Dangerous Weapon and Murder in the First Degree. These cases are number 74 CR 4356 and 74 CR 4358, respectively. Each of the defendants pleads not guilty to each of the charges lodged against him, as well as any lesser offenses included therein. Upon their pleas of not guilty, there arises in behalf of each of them a presumption of innocence of all charges included in the Bills of Indictment and places upon the State of North Carolina the burden of proof. The measure of proof is beyond a reasonable doubt.
>
> This means that the defendants and each of them come into court presumed to be innocent of all charges and this presumption of innocence remains with each of them until the State proves his guilt beyond a reasonable doubt."

The care that the trial Court exercised in his preliminary instructions in assuring that the jury considered the separate offenses charged against each defendant and the evidence applicable thereto was further emphasized by the Court when it continued this separation in the jurors' minds by carefully detailing the separate offenses alleged to have been committed and their possible verdicts upon each offense as to each defendant. (R pp 521 and 522)

the conduct of the trial did the father or son affirmatively attempt to discredit or implicate his co-defendant then on trial. Separate evidence, therefore, which could conceivably be relevant only to one of the co-defendants, considering this background, could not have prejudiced either of the defendants on trial.

The State would, further, argue that, even if it be found that the co-defendants, Thomas Lee King and his father were slightly prejudiced by the introduction of evidence concerning the other, there was more than sufficient additional evidence directly tying each defendant to the crime to overcome any prejudice to their cases. As to both defendants' guilt, the record reveals:

(1) That the victim, Leo Davis, died from manual strangulation from a young man identified by an eyewitness as Thomas Lee King - (R p 54);

(2) That the wife of the deceased, who was herself attacked, recognized both of the defendants and later identified them in photographs as two persons coming to her well-lighted home on the night of the offense - (R p 59);

(3) That this victim-eyewitness saw Thomas Lee King choking her husband as she herself, was being dragged away and beat over the head with a hammer by Joseph King - (R p 67);

(4) That the victim-eyewitness recognized both Thomas Lee King and his father at the scene of the crime and identified them in photographs - (R p 112);

(5) That Thomas Lee King had on light blue or gray trousers (R p 90) which corresponded to the testimony of the cabdriver who picked up an individual fitting Thomas Lee King's description on the night in question (i.e. that his young passenger was wearing light blue clothing with a big patch of blood on the leg) - (R p 113);

(6) That Joseph King arrived with a knitted cap on his head and was dressed in dark or blue clothes similar to the blue jacket found on his premises - (R p 234);

(7) That the fingerprints found on a metal cashbox at the crime scene were identical to the fingerprints of the defendant, Thomas Lee King - (R p 244);

(8) That a Yellow cabdriver that picked individuals up fitting the description of the defendant and his father heard the younger passenger call the elder something like "Pappy". - (R p 114);

(9) That besides the patch of blood that he noticed on the younger passenger sitting on the front seat, he noticed that the older gentleman seated in the back had his head and face scratched up and bloody - (R p 114);

(10) That the jacket discovered at the defendant, Joseph King's, home had type "O" blood on it which matched the victim, Missouri Davis's blood type and was totally dissimilar to both his and his son's type "A" blood. And, that further, the handle of the hammer received into evidence and the right leg of the blue pants further introduced, each contained type "O" human blood - (R pp 253-277).

The separation of the evidence and cases by the Court in its charge and the identification in every instance of each portion of the evidence with the particular co-defendant involved would amply provide adequate safeguards to each of these non-antagonistic co-defendants. Additionally, in this regard it should be noted that neither defendant requested the Court to charge the jury to consider such evidence unrelated to himself, only for purposes for which it was competent. 1 Stansbury's, North Carolina Evidence, Brandis Revision, Sec. 79, pp. 240-241.

Examining all of the evidence from a different approach, it could be argued with some merit that each co-defendant, based upon the overwhelming direct and circumstantial evidence contained in the record, acted in concert by attacking both occupants in the house simultaneously - one with a hammer and the other through manual strangulation of the husband - attacks that the injured wife witnessed. Evidence, therefore, concerning each individual would have bearing on the guilt of the other participant in the common crime wherein they assisted each other.

The argument that the location of the hammer and the time lapse that had transpired when it was found rendered such evidence too remote to be admissible is untenable. See State v. Battle, 4 NC App 588, 167 SE 2d 476 (knife found eight days after incident occurred). And, the fact that a witness testified that the hammer was "similar" to the one used against her in the assault did not render such evidence inadmissible. See State v. Bass, 280 NC 435, 186 SE 2d 384 (witness testified that a jacket admitted into evidence was "similar" to a coat worn by defendant when he raped her). See also State v. Jarrett, 271 NC 576, 157 SE 2d 4, cert. den. 389 U.S. 865, 19 L.Ed. 2d 135, 88 S. Ct. 128.

II.

THE TRIAL COURT DID NOT COMMIT PREJUDICIAL ERROR WHEN IT PERMITTED THE STATE TO EXTRACT BLOOD AND HAIR FROM THE DEFENDANTS AND ADMIT INTO EVIDENCE COMPARISONS OF SAID BLOOD AND HAIR WITH BLOOD ALLEGEDLY FOUND AT THE SCENE OF THE CRIME AND TESTIMONY WITH RELATION THERETO.

Assignment of Error Nos. 2 (R p 609); 3, 4, & 5 (R p 610); 9 & 10 (R p 611); 16, 17, 18, 19, 20, 21, 22 (R p 611); 26, 27, & 28 (R p 610); 29, 30, 31, 32, 33, 34, 35, 36, 37, 39, 39, 40, 41, 42, 43, 44,

45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, (Rp 612); 56, 57, 58, 59, 60, 61, 64 (R p 613); 73, 74, 75, 76, 77, 78, 79, 80 (R p 614); 84, 85, 86, 87, 88, 89, 90, 91 (R p 615); 92 (R p 616); 99, 101, 102, 103, 104, 105 (R p 617); 110 (R p 618)

Exceptions Nos. 2 (R p 16); 3, 4, & 5 (R p 36); 9 (R p 125); 16, 17 (R p 167); 18, 19, 20 (R pp 133; 168); 21 & 22 (R pp 139; 169); 26, 27, 28, 29, 30, 31, 32 (R pp 175; 176; 168-169; 174-175); 33, 34, 35, 36 (R pp 175-181; 177); 37, 38, 39, 40, 41, 42, 43 (R p 178); 44, 45, 46 (R p 179); 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61 (R pp 178; 179; 180; 181; 182; 184; 225-226); 64 (R p 233); 73, 74, 75, 76, 77, 78, 79, 80 (R pp 254, 256, 273, 275, 276); 84 (R p 256); 85, 86, 87, 88, 89, 90 (R pp 272; 273; 275; 504); 91 & 92 (R p 276); 99 (R p 501); 101, 102, 103, 104, 105 (R p 504); 110 (R p 519)

The defendants advance the argument under these assignments of error that there was no factual basis for an Order allowing their blood to be withdrawn and hair samples to be taken. It is their contention, (particularly in the argument of the co-defendant, Thomas Lee King), that the exhibits involving blood as adduced from the testimony would not necessarily involve both defendants and, therefore, there was no foundation for the Court's Order allowing blood and hair to be taken from them at the hospital.

The State will respond to these defendants' contentions by first averring to the fact that there was an ample foundation laid by the presiding Judge to justify his Order requiring that the blood and hair samples be taken from the defendants. At pages 13-16 of the record, we have the Court's findings based upon the evidence that:

(1) The assaulted wife of the victim was found to be bleeding profusely as a result of an attack in her home by one of two men who used a hammer;

(2) That a claw hammer containing bloodstains was found relatively near the scene the next day;

(3) That a cabdriver picked up the defendant, Tommy King, on the night in question who had apparent bloodstains on his clothing; that investigating officers found a toboggan-styled cap in the victim's home with hair inside it which was not the property of the victim;

(4) That under authority of a search warrant, officers searched the home of the defendant, Joseph King, and seized clothing which appeared to be bloodstained;

(5) That bloodstains from the clothing taken in a valid search of Joseph King's home and the bloodstained hammer found near the crime scene along with blood samples from the victim have been sent to the State Bureau of Investigation for analysis;

(6) That in order to make a proper blood and hair comparison to determine the defendants' complicity or lack of complicity in the crime, such samples would be necessarily required from the defendants for analysis.

Certainly, it could not be argued that, considering this broad enumeration by the presiding Judge, that, as to both defendants, it was not necessary, and firmly founded in the evidence, that the co-defendants should be required to submit to the taking of blood and hair samples. Especially, would this examination seem necessary considering the fact that the defendants, by their pleas of not guilty, are controverting every fact in issue including the origin of the blood testified to as having been found on various items of clothing found in the defendant's home and on objects located in and around the crime scene.

The defendants concede that the authorities hold that a defendant's constitutional rights are not violated by the involuntary withdrawal of blood and the presentation of evidence in relation thereto. See State v. Cash, 219 NC 818, 151 SE 2d 277 (1941); 21 Am. Jur. 2d 389, Criminal Law, Sec. 364. See also State v. Bryant, 5 NC App 21 at page 29; 21 Am. Jur. 2d, Criminal Law, Sec. 364, page 389.

The second branch of the defendants objections hereunder relate to their complaint concerning the fact that they were not represented by counsel during the medical procedure at the hospital concerning the removal of hair particles and blood samples from their persons - all in violation of their constitutional rights. The State does not feel a necessity to answer this contention by citing those cases wherein blood or fluid was taken from a defendant when he was unconscious or did not know why he was asked to give such a sample. (Being obvious instances wherein those defendants could not have been represented by counsel.) See State v. Diguid, 50 Ariz. 276, 72 P. 2d 435; Davis v. State, 189 Md. 640, 57 A. 2d 289. It is strongly argued by the State that counsel effectively waived such defects as was emphasized by the Court in its findings at pages 32-36 of the record. The defendants, through counsel, made a motion to suppress all evidence having to do with

their furnishing blood samples for comparison with stains found on items of clothing and, other objects in and around the crime scene and the blood of the victim. As a foundation for his Order, the presiding Judge found:

> *(1) That counsel for the defendants were specifically allowed, if they so desired, to be present when blood was extracted from their clients and a copy of said Order was served on counsel on February 28, 1974; (R p 33)*
>
> *(2) That counsel was not present during the taking of these samples on February 28, 1974; (R p 33)*
>
> *(3) That counsel at their request were furnished samples of the tests conducted at the hospital; (R p 33)*
>
> *(4) That while counsel addressed complaints to their absence at the hospital during the taking of the defendants' blood, they conceded that their serious objection was to their being compelled to furnish blood and the introduction of evidence based thereon; (R p 34)*
>
> *(5) Counsel were repeatedly told that they could have all blood tests results when received and were or would be furnished same; (R p 35) and most importantly*
>
> *(6) That the Court indicated, should it be the request of defense counsel, that it would order the blood withdrawing procedure disregarded, and another one staged in their presence. No such request was made. (Therefore, quite justifiably, upon these detailed findings, the defendants' motions to suppress were denied.)*

The State can add nothing to the findings of implied waiver by counsel for the defendants to be present at the hospital during the blood and hair extractions as were so clearly set forth by Judge Hasty. It should be mentioned, however, that the record does not reveal that the attorneys for the defendants ever affirmatively requested to be present at the hospital during the extractions.

The defendant, Joseph King's, contention that the Court did not hear evidence as to the lawfulness of the search and seizure of the blood-stained clothing from his home and that the Court failed to make findings of fact thereon when he objected to the search is untenable. The Court, clearly allowed a direct examination by Mr. Forbes of the issuing Magistrate concerning the affidavit upon which he issued a search warrant. The Magistrate actually read the affidavit into the record (R pp 170-173) and was cross-examined by the State (R p 173). The Court, thereafter, did not reiterate the statements contained in the affidavit which had just been read in his findings supporting the Magistrate's issuance of a search warrant, but clearly incorporated it as part of the record (R pp 174-175).

This incorporation clearly formed a sufficient foundation for the Court's finding of probable cause for the issuance of the warrant. See State v. Jackson, 18 NC App 234, 196 SE 2d 568.

III.

THE TRIAL COURT BELOW DID NOT COMMIT PREJUDICIAL ERROR WHEN IT FOUND THE WITNESSES OFFERED BY THE STATE TO BE EXPERTS IN THEIR RESPECTIVE FIELDS IN THE PRESENCE OF THE JURY AND IN REFERRING TO THEM AS SUCH IN HIS CHARGE.

Assignments of Error Nos. 7 (R p 610); 56 (R p 613); 65 (R p 613); 66, 67, 68 (R p 613); 73, 75, & 79 (R p 614); 81, 89, 90, & 91 (R p 615); 96 (R p 616); 113 (R p 618)

Exceptions Nos. 7 (R p 53); 56 (R p 209); 65 (R p 242); 66, 67, & 68 (R pp 243-244); 73 (R p 254); 75 (R p 256); 79 (R p 275); 81 (R p 254); 89, 90, 91 (R pp 508-509); 96 (R p 526); 113 (R p 526)

The defendants contend that the trial Court committed prejudicial error, when, in the presence of the jury, it declared certain witnesses for the State to be experts following a detailed summary of their qualifications. The defendants admit that the case of Speitzman Company v. Williamson, 12 NC App 297 at page 305 held against him. In that case, the Court found that a determination by the trial Court in the presence of the jury that a defendant's witness was an expert would not be prejudicial error where the witness was not a party to the litigation. The Court made a finding that a securities expert, who qualified as an expert, was not prejudicially found to be such by the Court in the presence of the jury. The Court went on to say that such qualification was entirely dissimilar to the situation wherein a surgeon, who was a defendant in a malpractice suit, was found to be an expert witness on his own behalf. As is evident from the record, the witnesses who were found to be experts in their fields in the present case were, likewise, not parties to the litigation.

The defendants, however, do not stop at this juncture in their arguments but, rather, proceed to say that, cumulatively, prejudicial error was committed by the trial Court when it is considered that the Court qualified witnesses as experts during the course of their examination and further mentioned in his charge that an experienced fingerprint analyst and his supervisor had testified for the State. The defendants contend that the

mention of the State's expert witness in its charge brought the present case within the precepts of State v. Melton, 11 NC App 180, 180 Se 2d 476 (1971), wherein the Superior Court, in two portions of its charge, made reference to the fact that he had found a fingerprint analyst to be an expert.

The State would respond to this further argument by averring to the fact that, at no point in his charge, did the trial Court in the present case mention that he himself had found a State's witness to be a fingerprint expert. The Court's only reference to this aspect of the case was a reference to the fact that an experienced fingerprint analyst and his supervisor had testified for the State. In Melton (supra), there were two definitive statements by the trial Court that he had found a State's witness to be an expert. Additionally, it should be mentioned that in Melton (supra), the Court of Appeals of North Carolina acknowledged that the State's entire case would rise and fall upon the validity of the State's fingerprint testimony and, therefore, the Court's expression of any opinion that might lend credence to this testimony would be damaging. In the present case, however, there was other clear and convincing evidence that pointed to the defendants' guilt. Apart from evidence concerning defendants' fingerprints, we have the eyewitness account of one of the victims who was brutally attacked at the death scene.

ARGUMENT

V.

THE TRIAL COURT COMMITTED NO ERROR BY NOT RESTRICTING THE ADMISSIBILITY OF CERTAIN EVIDENCE TO JOSEPH KING.

Assignment of Error Nos. 7, 9 (R p 581); 10 (R p 582); 12 (R p 589); 15 (R pp 590-591); 10 (R pp 582-588); 21 (R p 593); 25 (R pp 594-596)
8, 10, 11 (R p 611); 15, 16, 17 (R p 612); 22, 24 (R p 613); 25 (R pp 613-614); 28-31 (R pp 614-615); 32, 33, 36, 37 (R p 615).

Exception Nos. 11 (R p 133); 22 (R p 174); 23, 24, 25 (R p 175); 64, 65, 66 (R p 184); 69.70, 71 (R p 225); 72 (R pp 225-226); 73, 74 (R p 226); 26 (R p 175); 27-32 (R p 176); 33, 34, 36 (R p 177); 37-43 (R p 178); 44-47 (R p 179); 48-53 (R p 180); 54-58 (R p 181); 59 (R p 182); 84 (R p 594); 88 (R pp 273-274); 89, 90 (R p 274); 91 (R pp 274-275); 92 (R p 275)
8 (R p 72); 10 (R p 126); 11-19 (R pp 126-128); 15 (R pp 174-175); 33-44 (R pp 175-182); 45-52 (R pp 182-183); 64 (R p 233); 66-68 (R pp 243-244); 66-68 (R pp 243-244); 69-70 (R pp 249-250); 74-80 (R pp 256, 273, 275, 276); 81 (R p 307); 82 (R pp 316); 85-88 (R p 504); 89-91 (R pp 508-509).

Argument I of this brief is hereby incorporated by reference in response to Argument V of the Appellants' Briefs. In addition, it is significant to note several additional points.

With reference to the identification by Missouri Davis of the blue coat allegedly worn by Joseph King on the night in issue, the question was answered prior to an objection being interposed by defense counsel. An objection to an answer responsive to a question comes too late when the witness has answered the question. State v. Wilson, 280 NC 674 (1972). Generally, an objection is waived unless it is made at the proper time. State v. Blalock, 9 NC App 94 (1970) cert. denied 401 US 712. In such a situation, a motion to strike would be addressed to the discretion of the trial court. State v. Perry, 275 NC 565 (1969); State v. Walsh, 19 NC App 420 (1973). It is significant to note that the record does not reveal any motion to strike this evidence.

Considering the above rules, it is apparent that the trial court did not err in stating that the witness's answer was already in evidence when defense counsel requested a voir dire examination. A motion to strike, instead of a voir dire examination, would have been appropriate at this point. Of course, such motion would have been addressed to the discretion of the trial judge. Perry, supra.

The Court correctly instructed the jury that it was not to consider the evidence of Charles Bell and J. W. Wells as to defendant Thomas King as that evidence related to those policemen's actions in searching

the residence of Joseph King. The search was made pursuant to a search warrant for that residence and Thomas King did not reside there. Thus, the actions of these police officers pursuant to the warrant clearly should not have been admissible against Thomas King. Even if such evidence should have been admissible against Thomas King, it certainly was not prejudicial to him.

According to the record, no motion to strike was made as to the evidence of Martin Barlow relating to his receipt of the coat found during the search of Joseph King's home and its delivery to the SBI. Also, the record reveals no motion to strike the evidence of Vance Furr relating to the receipt of the coat and its delivery to the SBI. According to State v. Battle, 267 NC 513 (1966) a motion to strike would have been necessary to preserve an exception to the admission of the evidence.

With regard to the defendant's contention that certain evidence should have been limited in its admissibility to Joseph King, the Court should have noted that the record reveals no request for such instructions. The general rule is that a request must be made in such a situation:

> "...as a general rule, the incompetency of the evidence for one purpose will not affect its admissibility for other and proper purposes. The evidence will be admitted, and the party against whom it is offered will be entitled, on request to have the jury instructed to consider it only for the purposes for which it is competent." 1 Stansbury's North Carolina Evidence, Brandis Revision, § 79, pp 240-241. (Emphasis added.)

The Appellants rely upon State v. Franklin, 248 NC 695 (1958) in their contention that a request for such instructions was not necessary. However, Franklin, supra, stands for the principle that where evidence is admissible against one party and not for any purpose against another, a general objection made by the latter would be sufficient. State v. Kelly, 19 NC App 60 (1973). In the present case, however, a situation is presented that is not similar to the circumstances contained in Franklin, supra. We must consider here that the two defendants acted in concert when they attacked both the husband and wife simultaneously. Therefore, evidence directly concerning one defendant would have bearing upon the guilt of the other defendant as proving their coordinated wrongful action.

As to the validity of the search warrant, the trial court made findings and conclusions (R pp 174-175). The findings of the trial judge when supported by competent evidence are binding and conclusive in appellate courts. State v. Stepney, 280 NC 306 (1972). In addition, it is

apparent that the search warrant was sufficient to satisfy the requirements of N.C.G.S. § 15-26. Thus, the search warrant was valid and was properly concluded to be so by the trial judge.

VI.

(A)

THE TRIAL COURT DID NOT ERR BY NOT DEFINING THE WORD "ATTEMPT" IN ITS INSTRUCTIONS.

Assignment of Error Nos. 49 and 50 (R pp 607-608).

Exception Nos. 123 (R p 547) and 124 (R p 548)

The Appellant contends that the trial court erred by failing to define the word "attempt" when referring to attempted robbery in its instructions. It is not error for the court to fail to define and explain words of common usuage and meaning to the general public in the absence of a request for special instructions. State v. Patton, 18 NC App 266 (1973). This rule applies equally to essential elements of the crime charged as well as to other legal terms contained in the charges. Patton, supra. See also State v. Godwin, 267 NC 216 (1966). The specific issue raised by the Appellant in this case was answered in State v. McNeely, 244 NC 737 (1956). The Court in McNeely, supra, held that the word "attempt" is self-explanatory and that the Court is not required to define it.

It is important to note that the record does not reveal any objection or exception by defendant Joseph King. Thus, any objection would have been waived. Blalock, supra; State v. Davis and State v. Fish, 284 NC 713 (1974).

(B)

THE TRIAL COURT DID NOT ERR IN ITS INSTRUCTIONS REGARDING THE EVIDENCE.

Assignment of Error Nos. 53 and 54 (R p 609)
40, 41 (R p 616); 42 (R pp 616-617); 43 (R p 617); 53 (R p 617); 54 (R pp 617-618); 55 (R p 618).

Exception Nos. 127 (R p 556); and 128 (R p 557)
94, 95 (R pp 521, 522); 96 (R p 526); 97, 98 (R pp 536-540); 99 (R p 540); 112, 113, 114 (R p 557).

N.C.G.S.§1-180 requires the trial judge to apply the law to the various factual situations presented by conflicting evidence. State v. Keziah, 279 NC 681 (1967). The Court is not required to recapitulate all the evidence in instructing the jury. The requirement of N.C.G.S.§1-180

is that the judge shall state the evidence necessary to explain the application of the law thereto. This requirement shall be met by recapitulating the main points of the evidence relied upon by each side. State v. Noell, 284 NC 670 (1974). The general rule, as stated in State v. Henderson, 285 NC 1 (1974), is that objections to the charge in stating the contentions of the parties must be called to the Court's attention in apt time to provide an opportunity for correction. See Noell, supra; State v. Guffey, 265 NC 331 (1965). The complaints of the appellants fall within the general rule which requires counsel for appellants to bring their objections to the charge to the Court's attention in apt time. The record does not reveal that the appellants' counsel brought such an objection to the Court's attention in apt time. Clearly, a complete reading of the charge shows that it was not weighed in favor of the State or that the alleged inconsistency or incorrectness of the charge in issue amounted to an expression of opinion by the trial judge in violation of N.C.G.S. §1-180.

In addition, it is significant to note that the trial court charged as follows:

> "Members of the Jury, I did not attempt to recapitulate or summarize all of the evidence in the cases. I only reviewed, as I recalled, what certain of the evidence offered by the State and the defendants tends to show. You will note I use this phrase, 'tends to show'. I did this because what, if anything, the evidence does show, is for you as the jury to determine. I only referred to such of the evidence as I deemed necessary to explain and apply the law in the cases. All of the evidence is before you and you are not to understand that I am emphasizing any part of the evidence over and against any other part of the evidence. All of the evidence is important and it is your duty to remember it all, consider it all and weigh it all in arriving at your verdicts in these cases. Therefore, if your recollection of what the evidence was differs from that of the District Attorney or counsel for the State and counsel for the defendants or even the Court says it was, you will rely and be governed entirely and solely upon your own recollection of what the evidence was in these cases." R p 538

It is apparent that the trial judge did not violate N.C.G.S. §1-180 in its instructions regarding the evidence. Instead, the trial judge clearly emphasized that the jury was to rely entirely on its own recollection of the evidence.

In addition, the Appellants contend that the trial court erred by referring to the defendants as "Joe" and "Tommy" in its instructions. The record clearly indicates that witnesses referred to the defendants as

"Tommy" and "Joe". Thus, it was certainly proper for the Court to so refer to the defendants in recapitulating the evidence of both the State and the defendants.

Also, the Appellants contend that the following paragraph was included in what appeared to be a statement of contentions of Thomas Lee King:

> "At 10:30 p.m. on February 18, 1974, at the Charlotte Hospital, she was shown several folders of photographs. In viewing the first folder, she picked out Thomas Lee King as being the younger man." R p 528

This was a portion of the evidence resulting from cross-examination of Missouri Davis, a witness for the State, by counsel for Thomas Lee King. This was clearly pointed out by the judge in his instructions. (R p 527)

ARGUMENT

VII.

THE TRIAL COURT DID NOT ERR IN DENYING THE DEFENDANTS' MOTIONS TO SET ASIDE THE VERDICT AND THEIR MOTIONS FOR MISTRIAL.

Assignments of Error No. 55 (R p 609)
33, 35 (R p 615); 39 (R p 616); 52 (R p 618).

Exception Nos. 129 (R p 575)
82 (R p 316); 84 (R p 499); 93 (R p 519); 111 (R p 575).

For the reasons stated in the preceding arguments, it is apparent that the trial court did not err in denying the defendants' motions for a mistrial and their motions to set aside the verdict.

CONCLUSION

It is respectfully submitted that, by reason of the matters and things set forth above, the trial Court did not commit reversible error. The cause, therefore, should not be reversed and the defendants should not be granted new trials.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief for the State was served on the defendants by mailing copies thereof, postage prepaid, to their attorneys, the Honorable Frank Patton Cooke, 195 West Main Avenue, P. O. Box 1885, Gastonia, N. C. 28052 and the Honorable Robert H. Forbes, P. O. Box 2162, Gastonia, N. C. 28052.

This the 21st *day of* April, *1975.*

Thomas B. Wood

Thomas B. Wood

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1974

No. 74-669

KELLY DEAN SPARKS,
Petitioner,

-vs-

STATE OF NORTH CAROLINA,
Respondent.

BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF AUTHORITIES

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OPINION BELOW

From a verdict of guilty of first degree murder and the imposition of a sentence of death entered by the Guilford County Superior Court in October of 1973, the defendant perfected a direct appeal to the North Carolina Supreme Court. That Court found no error, and upheld the sentence of the Superior Court. The opinion of the Supreme Court of North Carolina is found in its reports at 285 N.C. 631.

JURISDICTION

The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. Sec. 1257(3).

QUESTIONS PRESENTED

I.

WHETHER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES REQUIRES THAT A TRANSCRIPT BE MADE OF THE *VOIR DIRE* EXAMINATION OF PROSPECTIVE TRIAL JURORS IN A CAPITAL CASE, SO AS TO ASSURE A RECORD OF SUFFICIENT COMPLETENESS TO PRESERVE THE DEFENDANT'S RIGHTS AGAINST UNCONSTUTUTIONAL METHODS OF JURY SELECTION, AS MANDATED BY *WITHERSPOON v. ILLINOIS*, 391 U.S. 510 (1968).

II.

WHETHER THE RIGHTS OF A CRIMINAL DEFENDANT TO BE PRESUMED INNOCENT UNTIL PROVEN GUILTY AND TO HAVE THE BURDEN UPON THE STATE TO PROVE ALL ELEMENTS OF THE CASE BEYOND A REASONABLE DOUBT ARE VIOLATED BY INSTRUCTIONS THAT (a) A KILLING IS PRESUMPTIVELY UNLAWFUL AND DONE WITH MALICE WHEN A DEADLY WEAPON IS INTENTIONALLY USED, AND (b) THE BURDEN OF PROOF IS ON THE DEFENDANT TO SATISFY THE JURY THAT THERE WAS NO MALICE ON HIS PART, SO AS TO REDUCE THE CRIME TO VOLUNTARY MANSLAUGHTER.

III.

WHETHER IMPOSITION AND CARRYING OUT OF A SENTENCE OF DEATH FOR THE CRIME OF MURDER UNDER THE LAW OF NORTH CAROLINA VIOLATES THE EIGHTH AMENDMENT OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. CONSTITUTION

ARTICLE 4, SECTION 4.

"The United States shall guarantee to every state in this union a republican form of government . . . ."

("Republic, commonwealth, a popular state or government; or a nation where the people have the government in their own hands." Vol. III ENCYCLOPEDIA BRITANNICA A DICTIONARY OF ARTS AND SCIENCES, 548, 1st Ed. (1771))

("republic, n. number 1. A state in which the supreme power rests in the body of citizens entitled to vote and is exercised by representatives chosen . . . by them." THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE, Unabridged, 1218 (1966))

AMENDMENT V.

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

AMENDMENT VIII.

"Excessive bail shall not be required, nor excessive

fines imposed, nor cruel and unusual punishments inflicted."

AMENDMENT X.

"The powers not delegated to the U.S. by the Constitution, nor prohibited by it to the states, are reserved to the states, respectively, or to the people."

AMENDMENT XIV.

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

GENERAL STATUTES OF NORTH CAROLINA

N.C.G.S. 14-17

Murder in the first and second degree defined; punishment. - A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death: *Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the Court shall so instruct the jury.*• All other kinds of murder shall be deemed

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• Subsequent to this Court's decision in *Furman*, the North

murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the State's prison.

STATEMENT OF CASE

The petitioner was tried upon a bill of indictment charging him with the murder of George L. Lashley, the Chief of Police of Gibsonville, North Carolina. He was tried by a Judge and a jury in the Guilford County Superior Court at Greensboro, North Carolina, during the October 29, 1973 session of Court. The jury found the defendant guilty of murder in the first degree and the Superior Court entered its judgment condemning the defendant to death. The judgment of the lower court was affirmed by the Supreme Court of North Carolina on appeal.

STATEMENT OF FACTS

The respondent, State of North Carolina, agrees with those facts pertinent to this petitioner's rights to be adjudicated in the Supreme Court of the United States as set forth in that opinion of the North Carolina Supreme Court which is appended as Appendix "A" to the petitioner's Petition for Writ of Certiorari and heretofore filed in this Court.

ARGUMENT

I

THE COURT SHOULD NOT GRANT CERTIORARI TO CONSIDER WHETHER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES REQUIRES THAT A TRANSCRIPT BE MADE OF THE *VOIR DIRE* EXAMINATION OF PROSPECTIVE TRIAL JURORS IN A CAPITAL CASE, SO AS TO ASSURE A RECORD OF

Carolina Supreme Court in *State v. Waddell*, 282 N.C. 431, 194 S.E. 2d 19 (1973) declared the portions set forth in italics above unconstitutional.

SUFFICIENT COMPLETENESS TO PRESERVE THE DEFENDANT'S RIGHTS AGAINST UNCONSTITUTIONAL METHODS OF JURY SELECTION AS MANDATED BY *WITHERSPOON V. ILLINOIS*, 391 U.S. 510 (1968).

Constitutional due process does not require the State to furnish a transcript of the *voir dire* examination of the jury when defendant has not requested such a transcript.

Petitioner Sparks claims that constitutional due process requires that the State furnish a transcript of the *voir dire* examination of prospective trial jurors in a capital case even in the absence of a request. This question is not properly before the Court, because, for all that appears in the record, the question is raised for the first time in the Petition for Certiorari. The question was neither raised in nor passed upon by the Supreme Court of North Carolina, nor does it appear in the record that a request was made to the trial court that a transcript be made and made available to the petitioner.

As this Court said in *Williams v. Georgia*, 349 U.S. 375, 382 (1954),

> "A state procedural rule which forbids the raising of a federal question at late stages of the case, or by any other than a prescribed method, has been recognized as a valid exercise of State power"

See also, *Chambers v. Mississippi*, 410 U.S. 284, at 308 et. seq. (1973) (opinion of Rehnquist, J.).

The rule of appellate practice in North Carolina is to the effect that the:

> "Supreme Court will not decide questions which have not been presented or adjudicated in the court below, especially questions relating to the constitutionality of a statute or an act of Congress". 1 *Strong's N. C. Index 2d*, p. 106 (1967), and cases there cited.

There is a second reason that this Court should not grant certiorari to question No. 1 raised by the petitioner, Sparks,

as to the requirement of a transcript of the *voir dire* examination of jurors. It is not the practice in North Carolina to make a transcript of the *voir dire* examination of jurors unless the transcript is requested by the defendant. But if such transcript is requested, it is granted as a matter of course. *State v. Fowler*, 285 N.C. 90, 103-107 (1974).

The Supreme Court of North Carolina in the *Fowler* case said, 285 N. C. at 107:

> "It is the primary duty of defense counsel to prepare and docket a true and adequate transcript of the record in the case on appeal in a criminal case. *State v. Fox*, 277 N.C. 1, 175 S.E. 2d 561 (1970); *State v. Roux*, 263 N.C. 149, 139 S.E. 2d 189 (1964); G.S. 15-180; G.S. 1-282. It is also the duty of the solicitor to scrutinize the copy that the appellant serves upon him. If it contains errors or ommissions, it is the solicitor's responsibility to file exceptions or countercase. *State v. Fox, supra*. If, as in the present, defense counsel desires to take exception to the act of the Court in excusing a prospective juror, he should either enter into a stipulation with the State setting out in detail the reason for excusing the juror, or he should include a transcript of the *voir dire* examination as to that juror in the case on appeal. He should not take exception to his own failure to prepare and docket a true and adequate transcript of the record in the case on appeal. Such action is not approved."

The principle underlying the right to counsel case, *Gideon v. Wainwright*, 372 U.S. 335 (1963), is that the criminal defendant should have at his disposal a trained advocate who knows the law and is able to adequately preserve his rights. All that has happened in this case is that Sparks' counsel failed to request that a transcript of the *voir dire* examination be made and failed to put a transcript of that *voir dire* examination into the record. In no sense of the word has the State of North Carolina *denied* this petitioner a transcript of the *voir dire* examination of jurors in his case in order that he might preserve his rights under *Witherspoon v. Illinois, supra*.

II

THE COURT SHOULD NOT GRANT CERTIORARI TO CONSIDER WHETHER THE RIGHTS OF A CRIMINAL DEFENDANT TO BE PRESUMED INNOCENT UNTIL PROVEN GUILTY AND TO HAVE THE BURDEN UPON THE STATE TO PROVE ALL ELEMENTS OF THE CASE BEYOND A REASONABLE DOUBT ARE VIOLATED BY INSTRUCTIONS THAT (a) A KILLING IS PRESUMPTIVELY UNLAWFUL AND DONE WITH MALICE WHEN A DEADLY WEAPON IS INTENTIONALLY USED, AND (b) THE BURDEN OF PROOF IS ON THE DEFENDANT TO SATISFY THE JURY THAT THERE WAS NO MALICE ON HIS PART, SO AS TO REDUCE THE CRIME TO VOLUNTARY MANSLAUGHTER.

The State of North Carolina will substantially ratify the arguments presented by it in the Supreme Court of North Carolina and as contained in its brief filed in that Court. In its brief, the State advocated the position that the North Carolina rule substantially places the burden of proving the existence of malice upon the State and absolves the State of this burden only in extreme circumstances. Thus, the State could prove that a defendant: (1) used a deadly weapon; (2) pointed at the deceased; (3) fired the fatal shot, and still it would be charged with the burden of proving that such acts were accomplished intentionally. In effect, therefore, it would not be until the state also proved that the defendant intentionally used a deadly weapon that the burden of proof of a lack of malice toward the deceased would arise and shift to the defendant. The burden of such proof remains with the State and shifts only after additional proof of an intentional killing is established. It must be advocated that the shifting of the burden of proof to the defendant to disprove that he maliciously killed his victim, when these extreme circumstances are all proven, would be desirable. Especially would this be so when it is considered that evidence in mitigation would be more readily available to the defendant. See *State v. Drake*, 8 N.C. App. 214, 174 S.E. 2d 132 (1970); *State v. Currie*, 7 N.C. App. 439, 173 S.E. 2d 49 (1970); *State v. Sanders*,

276 N.C. 598, 174 S.E. 2d 487 (1970).

It is therefore, strongly argued by the State of North Carolina that its rule with regard to the burden of proof in a homicide case does not run counter to the holdings of *Re Winship*, 397 U.S. 358 (1970) and *Speiser v. Randall*, 357 U.S. 513 (1958). Rather, such rule is consonant with these holdings considering the fact that the initial burden of proof in such cases remains with the State.

III

THE COURT SHOULD NOT GRANT CERTIORARI TO CONSIDER WHETHER IMPOSITION AND CARRYING OUT OF A SENTENCE OF DEATH FOR THE CRIME OF MURDER UNDER THE LAW OF NORTH CAROLINA VIOLATES THE EIGHTH AMENDMENT OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

A. *The mere existence of prosecutorial discretion, plea bargaining, the absolute requirement for the imposition of the death penalty upon capital offense convictions, and executive clemency do not bring a mandatory death penalty statute within the prohibitions of the Furman decision.*

In *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L.Ed. 2d 346, the Supreme Court of the United States held that the Eighth and Fourteenth Amendments to the Constitution of the United States forbid a state to inflict the penalty of death if, under the law of the state, either the jury or the judge is permitted, as a matter of discretion to choose between the imposition of the death penalty and the imposition of the penalty of imprisonment. The North Carolina Supreme Court case of *State v. Waddell*, 282 N.C. 431, 194 S.E. 2d 19, 23 (1973) was decided by that Court with knowledge of this Court's holding in *Furman* and decreed that the portion

of N.C.G.S. 14-17 which allows the jury the discretion (upon their guilty verdict of first degree murder) to recommend life imprisonment, invalidated only the discretionary portion of the statute and that (prospectively from the January 18, 1973 date of the *Waddell* decision) the North Carolina law would require that the court must pronounce a sentence of death upon every guilty verdict for any of the four capital offenses in North Carolina. The *Waddell* case was tried in the Superior Court of North Carolina prior to the *Furman* decision, and Waddell was sentenced to death. It was the first case to reach the North Carolina Supreme Court subsequent to *Furman*. The North Carolina Supreme Court then applied this court's *Furman* decision to Waddell and ordered his death sentence vacated and that he be sentenced to life imprisonment, 282 N.C. at 447 (North Carolina Supreme Court Reports).

The North Carolina Supreme Court further declared unconstitutional the following provisions of North Carolina General Statutes 14-17 (murder); 14-21 (rape); 14-52 (burglary); and 14-58 (arson):

> "Provided, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury."

For the reasons set forth in its opinion, our court demonstrated that the proviso clause was clearly severable from the clause setting forth the punishment as established by the North Carolina General Assembly. See *Waddell*, 282 N.C. at pages 441-445.

The *Waddell* decision thus left death as the only permissible punishment in North Carolina for the crimes of first degree murder, rape, burglary and arson. The North Carolina Constitution of 1970 specifically provided for such punishment.

Our court in *Waddell* went even further to protect the constitutional rights of its citizens against *ex post facto* laws, for at 282 N.C. at page 446, of that opinion it *held*:

"North Carolina's mandatory death penalty for

> rape, murder in the first degree, burglary in the first degree and arson may not be constitutionally applied to any offense committed *prior to the date of this decision but shall be applied to any offense committed after such date*. (Emphasis added)."

The North Carolina General Assembly has consistently decreed the death penalty for first degree murder and rape for nearly two hundred years and has recently reaffirmed that policy.

In 1778, the State of North Carolina enacted what is now codified as G.S. 4-1 which states:

> "All such parts of the common law as were heretofore in force and use within this State, or so much of the Common Law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this State."

As both murder and rape were capital felonies under the common law, they became so in North Carolina in 1778. Thus death has been the punishment for murder in the first degree and rape in North Carolina for nearly two hundred years. *Waddell, supra*, at 441.

It was in 1949 that our present statutes providing for punishment in capital cases were amended. Prior to that time the punishment was death.

The amendments to each of our capital punishment statutes added the proviso which (1) empowered the *jury in its discretion* to recommend and thus to fix the punishment at life imprisonment, and (2) required the trial judge to so instruct the jury. *Waddell, supra*, at 441.

The question which the North Carolina Supreme Court was confronted with was:

"Does the remainder of G.S. 14-21 stand alone with death as the mandatory punishment for rape; or, is the proviso such a constituent and inherent part of a single statutory scheme of punishment that it is inseverable and the entire statute must fall?"

It was the sole duty and responsibility of our Supreme Court to answer that question. Justice Lake, speaking in a concurring opinion in *Waddell*, summed up that duty as concisely as can be done at 282 N.C. 448 and 449. He said:

"The Supreme Court of the United States being the higher authority on the validity of judgments under the Consitution of the United States, its mandates, issued in reliance upon *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed. 2d 346, vacating the death sentences previously affirmed by this Court in the five cases cited in the opinion of Justice Huskins, became the law of those five cases. Under the compulsion of those mandates, this Court remanded those cases to the respective superior courts for the imposition of sentences of life imprisonment.

The present case, on the contrary, is before us for the first time. In it we have no mandate from the Supreme Court of the United States vacating the death sentence imposed upon this defendant. In the absence thereof, it is our duty, not that of the Legislature, to determine just what the United States Supreme Court decided in *Furman v. Georgia, supra*, and to determine the present state of the law of North Carolina with reference to punishment for the crime of rape in the light of that decision.

Only this Court can determine whether any portion of G.S. 14-21 is the law of North Carolina today and, if so, which portion. The Legislature, now in session, cannot make that determination. The Legislature can determine what the law of this State ought to be and shall be in the future. That is policy making and that is the Legislature's

prerogative and responsibility. It is for us, and for us alone, to determine what part of G.S. 14-21, if any, is the law of North Carolina today and determinative of the validity of the sentence from which this defendant appeals. That is not policy making but the interpretation of the statute - an exercise of the judicial function which we may not abdicate or assign to the Legislature. Constitution of North Carolina, Art. 1, §6; Art. IV, §1.

It is quite clear, as the opinion of Justice Huskins plainly states, that it is for the Legislature, not for this Court, to determine the policy of this State as to what acts shall be deemed crimes and as to the punishment therefor; that is, to determine what punishment ought to be and shall be imposed for the offense of rape, hereinafter committed. Constitution of North Carolina, Art. I §6; Art. II, §1; Art. XI, §2. But the Legislature has spoken in G.S. 14-21 and, until it speaks again, it is the duty of this Court to determine what, if anything, remains of its pronouncement in G.S. 14-21 after the decision in *Furman v. Georgia, supra*. No officer or agency, save this Court, can make that determination.

...Whether a statute is separable or inseparable is a question of statutory interpretation. It is well settled that the interpretation of a state statute is a question to be determined by the supreme court of the state. The Supreme Court of the United States has repeatedly accepted as binding upon it the interpretation placed upon state statutes by the highest courts of such states.

Thus, the Supreme Court of the United States has not said, and may not properly determine that G.S. 14-21 is or is not separable. What it has said in *Furman v. Georgia, supra*, is that the discretion which the proviso in G.S. 14-21 undertook to vest in North Carolina juries cannot be conferred upon them consistently with the Fourteenth Amendment. It having so held, it is now the prerogative and duty

> of this Court, and this Court alone, to determine whether the proviso is severable from the original statute unto which the proviso was attached by amendment in 1949. Thus, it is the date of the decision of that question by this Court – today – not the date of the decision in *Furman v. Georgia, supra*, which fixes the offenses of rape for which a death sentence may be imposed without running afoul of the *ex post facto* principle."

The Supreme Court of North Carolina answered the question it was confronted with in *Waddell* as follows:

> "The original portion of G.S. 14-21 with its mandatory death penalty for rape stood alone and was given full effect by the courts of this State for a century prior to the enactment of the 1949 proviso. Grammatically, as well as historically, the two portions of the statute are distinct and separate and the constitutional invalidity of the added portion will not destroy the part which was in existence prior to the enactment of the unconstitutional portion. (282 N.C. at 442-443).
>
> • • • •
>
> In light of the authorities cited, we hold that the unconstitutional proviso in G.S. 14-21 is severable and the remainder of the statute with death as the mandatory punishment for rape remains in full force and effect. (282 N.C. at 444-445).
>
> • • • •
>
> We recognize that the Legislature, not the courts, decides public policy, responds to public opinion and, by legislative enactment, reflects society's standards. The matter of retention, modification or abolition of the death penalty is a question for the law-making authorities rather than the courts. In view of the decision in *Furman*,

> the Legislature may wish to delete the unconstitutional proviso from G.S. 14-21 (rape), G.S. 14-17 (murder), G.S. 14-52 (burglary), and G.S. 14-58 (arson); or it may wish to rewrite these statutes altogether to give expression to what it conceives to be the public will. Meanwhile, we hold that the effect of the *Furman* decision upon the law of North Carolina concerning the punishment for rape, murder in the first degree, arson and burglary in the first degree is this: Upon the trial of any defendant so charged, the trial judge may not instruct the jury that it may in its discretion add to its verdict of guilty a recommendation that defendant be sentenced to life imprisonment. The trial judge should charge on the constituent elements of the offense set out in the bill of indictment and instruct the jury under what circumstances a verdict of guilty or not guilty should be returned. Upon the return of a verdict of guilty of any such offense, the court must pronounce a sentence of death. The punishment to be imposed for these capital felonies is no longer a discretionary question for the jury and therefore no longer a proper subject for an instruction by the judge. (282 N.C. at 445).

In the application of its decision in *Waddell*, the North Carolina Supreme Court directed that the death penalty could not be imposed on any criminal whether tried or not for any capital offense committed at or before the time of the finding of its decision on January 18, 1973. (282 N.C. at 446). Compare *Johnson v. New Jersey*, 384 U.S. 719 (1966).

In *State v. Jarrette*, 284 N.C. 625, 202 S.E. 2d 721 (1974), we have the first case to reach the Supreme Court of North Carolina for a crime committed subsequent to the *Waddell* decision. In the *Jarrette* case, the North Carolina Supreme Court was requested to reconsider its decision in *Waddell*. The court did and reaffirmed its decision, *id.* at page 654.

The Court noted in *Jarrette* at pages 654-655:

"The determination of what the statutes of this State mean, with reference to the punishment to be imposed for criminal offenses, is a question of State law and the determination thereof by this Court is authoritative. It is not a Federal question. *Adderly v. Florida*, 385 U.S. 39 . . . reh.den., 385 U.S. 1020; *Shuttlesworth v. Birmingham*, 382 U.S. 87. . . .

• • • •

The contention of (Jarrette) is that a state statute, which makes it mandatory that a defendant, fairly and lawfully convicted of first degree murder or of rape, be sentenced to death, violates the Eighth and Fourteenth Amendments to the Constitution of the United States.

• • • •

This is, of course, a Federal question and our determination of it is subject to review by the Supreme Court of the United States, but we must make the initial determination and must do so in the light of decisions heretofore rendered by that Court."

The major questions that the defendant recites in his petition regarding the prohibitions against the existence of prosecutorial discretion, plea bargaining, jury discretion, arbitrariness of a mandatory death penalty, and executive clemency are, also, very clearly answered in the *Jarrette* case.

As our court noted in the *Jarrette* case, 284 N.C. at 656:

"Although the mere statement of these contentions, in clear and simple terms, seems sufficient to show their lack of substance, the seriousness with which they are advanced impels us to take note of them briefly."

The court then addressed itself to each of the contentions of Jarrette and its answers are set forth at 284 N.C. 656-666.

These are found in Petitioner Jarrette's petition (No. 73-6877), Appendix "A", 202 S.E. 2d 721 at pages 741-747 which has heretofore been filed in this court.

The respondent, State of North Carolina, is unable, after research, to improve upon the reasoning and line of authorities set forth in the *Jarrette* opinion as noted immediately above. Accordingly, respondent adopts that reasoning and line of authorities as its response in this Court to the petitioners' contentions.

Respondent stipulates that the Governor of North Carolina does have the power to grant pardons and clemency to prisoners in the State's prison, and affirmatively shows that this Court has held this to be an unreviewable power in the hands of the chief executive. *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872).

Respondent stipulates that its District Attorneys have the duty to exercise their respective judgments as to what crime the State's evidence warrants prosecuting, but shows unto the Court this judgment is a prerequisite to the carrying out of his constitutional duty, but the District Attorney's judgment must be exercised in accordance with law.

Respondent stipulates that its juries must exercise their respective judgments as to what crime, if any, the State's evidence has convinced them beyond a reasonable doubt an accused has committed. The respondent shows unto the Court that this exercise of judgment is a prerequisite to the performance of its constitutional duty and must be done in accordance with law.

B. *The mandatory death penalty is neither arbitrary nor inconsistent with contemporary standards of decency.*

The proscription against cruel and unusual punishment is applicable to the States through the due process clause of the Fourteenth Amendment. *Powell v. Texas*, 392 U.S. 514 (1968); *Robinson v. California*, 370 U.S. 660 (1962). The North Carolina Supreme Court so held in *State v. Waddell*, 282 N.C. 431 at page 436, 194 S.E. 2d 19, 23 (1973).

Since the beginning of the United States as a separate nation two hundred years ago, death sentences have been administered by both the Federal and State governments for a variety of crimes. As the North Carolina Supreme Court noted in *Waddell, id.* at page 435:

> "Prior to the decision in *Furman v. Georgia* the United States Supreme Court implicitly approved or, albeit in dictum, expressly upheld the constitutionality of capital punishment in many cases, including *Wilkerson v. Utah*, 99 U.S. 130, 25 L.Ed. 345 (1879); *In re Kemmler*, 136 U.S. 436, 34 L.Ed. 519, 10 S.Ct. 930 (1890); *Weems v. United States*, 217 U.S. 349, 54 L.Ed. 793, 30 S.Ct. 544 (1910); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 91 L.Ed. 422, 67 S.Ct. 374 (1947); *Trop v. Dulles*, 356 U.S. 86, 2 L.Ed. 2d 630, 78 S.Ct. 590 (1958); *Witherspoon v. Illinois*, 391 U.S. 510, 20 L.Ed. 2d 776, 88 S.Ct. 1770 (1968); *McGautha v. California*, 402 U.S. 183, 28 L.Ed. 2d 711, 91 S.Ct. 1454 (1971). Thus, since the ratification of the Eighth Amendment one hundred eighty-one years ago, no decision of the United States Supreme Court prior to *Furman* casts the slightest doubt on the constitutionality of capital punishment."

Nor is there reason to believe this Court now considers capital punishment to be cruel and unusual punishment, *per se*, within the meaning of the eighth amendment. In *Furman v. Georgia*, 408 U.S. 238 (1972), the Justices of this Court went to some length to explain that they did not reach that question.

As the North Carolina Supreme Court noted in the *Waddell* case:

> "Mr. Justice Douglas . . . wrote . . . Whether a mandatory death penalty would otherwise be constitutional is a question I do not reach . . . (282 N.C. at 437).
>
> Mr. Justice Stewart . . . expressed his views as follows . . . The constitutionality of capital

> punishment in the abstract is not . . . before us in (Furman) . . . (282 N.C. at p. 437-438).
>
> Mr. Justice White . . . depicts his views. (thusly) . . . 'I do not at all intimate that the death penalty is unconstitutional *per se* or that there is no system of capital punishment that would comport with the Eighth Amendment . . . '(282 N.C. at 438).
>
> Four members of the (U.S. Supreme) court dissented (in Furman). The position of the four dissenters is best summed up by Chief Justice Burger as follows: . . . . Today the Court has not ruled that capital punishment is *per se* violative of the Eighth Amendment; nor has it ruled that punishment is barred for any particular class or classes of crimes . . . (282 N.C. at 439)."

Thus, our court having to apply this Court's *Furman* decision in *Waddell*, at 282 N.C. 439, held:

> "The foregoing quotations from the various separate opinions in *Furman* compel the conclusion that capital punishment has not been declared unconstitutional *per se*. Rather, the *Furman* decision holds that the Eighth and Fourteenth Amendments will no longer tolerate the infliction of the death sentence if either judge or jury is permitted to impose that sentence as a matter of discretion."

There can be no dispute that the federal government has no powers beyond those delegated to it in the Constitution. That is, it has only limited sovereignty.

This being so, then where does the remainder of the sovereign power lie? If the answer be "the people" then who has "the people" deemed should exercise the remaining powers of their sovereignty?

The State contends the answer is to be found in the tenth amendment to the Constitution.

It is the State's contention that two of the incidents of those sovereign powers reserved to the States is the power to define criminal conduct and provide for the punishment therefor within the State's territory, limited only by the prohibition against cruel and unusual punishment contained in the eighth amendment.

Roscoe Pound in Volume II, *Jurisprudence*, part 12, *Law and the State* at page 317 states:

> "As a legal conception, sovereignty seems to mean the aggregate of powers possessed by the ruler or the ruling organs of a politically organized society. Internal sovereignty, then, is the aggregate of the powers of internal control possessed by the ruling organs of the society by virtue of which it is paramount over all action within. According to Sir Frederick Pollock it is the capacity 'of making, declaring and amending the law . . . without reference to any other authority and without any legal limit to its own power.'

• • • •

> But the idea of sovereignty begins with Bodin. He defined the state (*republica*) as an association governed by the highest power (*suprema majestas*) as the 'highest power over citizens and subjects, free from laws' (*legibus soluta*). Its chief characteristic was the power to give law to all citizens.

• • • •

> At common law, social interests were largely secured by a doctrine that the king was *parens patriae*, father of his country. That is, he was the guardian of public and social interests of all kinds and hence his courts of law and of equity had a general superintendence of all matters where 'public rights' (i.e. social interests or public interests) might be jeopardized.

> Criminal law is the primary resource of the legal order for securing social interests immediately as

such. At common law, prosecutions were in the name of the king and under the control of the Attorney General to the extent of his authority to enter *nolle prosequi* . . . (Pound. III *Jurisprudence*, Part 14, Scope, *Subject Matter of Law*, at p. 264."

Pound further discusses *Interests* in Part 14 of Volume III, *Jurisprudence* at page 238, *et. seq.* He specifically discusses the interests of the state as a legal entity.

1. *Interests of the state as a juristic person.*

> No small part of international law is taken up with the interests of states which international law should secure against infringement by other states. Thus it has usually been said that the absolute or natural rights of states, meaning the interests which it is held should be secured, are: (1) The right of self-preservation and independence. This is analogous to the so-called natural rights of physical integrity and personal liberty ascribed to the individual. It is analogous to an individual interest of personality. (and) (2) The right of exclusive legislation and jurisdiction within its territory. This, too, is an interest of personality. It is an interest akin to the interest of the individual in being allowed to manage his own affairs freely. Juristically, it is secured as a liberty...."

As the tenth amendment is directed toward maintaining the class of interests referred to by Pound as "public interests", *id.* (Vol. III at page 235), the United States of America is equally obligated to protect the State of North Carolina's exercise of its sovereign rights as it is to protect any other constitutionally protected right whether it be individual or State.

This Court, even if it desired to do so, would not abrogate a constitutionally guaranteed right of a State nor would it abrogate such rights of an individual. Thus

"contemporary standards" of "society" cannot be a proper basis for abolishing the death penalty under the Eighth Amendment any more than the "contemporary standards" of the McCarthy era could abolish the rights guaranteed to the individual under the Fifth Amendment to the Constitution.

Only by the exercise of the sovereign power of the State through its legislature should the punishment for murder or rape be lessened in North Carolina.

No other body of men and women on the face of this earth should be lawfully entitled to exercise that governmental power other than the people of North Carolina, either directly in revolution or by vote on a new constitution.

In summarizing its argument, the State of North Carolina would aver that the petitioner is effectively requesting that this court construe the Eighth Amendment in such a manner as to nullify express provisions of the Fifth and Fourteenth Amendments, and deny to the states the power to prescribe and impose appropriate punishment for capital crimes. The petitioner is therefore requesting that this court nullify in reality, the power of the people as a republic, acting through their elected representatives, to establish appropriate punishments for crime. The respondent contends that to do this, the Court would be placing an unwarranted restriction on Article IV of the Tenth Amendment to the Constitution of the United States as well as nullifying express provisions of the Fifth and Fourteenth Amendments.

The lawmakers and law enforcers have an affirmative constitutional duty to ensure domestic tranquility. This is the office of the criminal justice system. (See Pound, III, *Jurisprudence*; Chapter 4, *Interest*, Section 92 at p. 264, (1959)). The limitations placed upon them by both the Federal and North Carolina Constitutions, are that "cruel and unusual" punishment shall not be afflicted. (See U.S. Constitution, Amendment VIII.) Neither life nor liberty shall be taken except by due process of law; nor shall any person be denied equal protection of the law. (See U.S. Constitution, Amendments V, VIII, XIV, and Article I, Sections 19, 22 and 27, North Carolina Constitution.) Operating within these limitations, it is State Legislatures' inherent and exclusive duty and it has the

correlative right to define crime and provide for the punishment of crimes committed. (See *Ex Parte U.S.*, 242 U.S. 27 (1916); *State v. Brewer*, 258 N.C. 533, 129 S.E. 2d 262 (1963) app. dismd., 375 U.S. 9 (1963); *Lawton v. Steele*, 119 N.Y. 226, 23 N.E. 878 (1890), aff'd. 152 U.S. 133 (1894).

And it has also been observed that:

> "The power is exclusive and it is not shared by the Court. So long as the Constitutional prohibitions are not infringed, the will of the legislature in this respect is absolute."

(See 21 Am. Jur. 2nd *Criminal Law*, Section 14, p.95, citing among others, *Central Lumber Company v. South Dakota*, 226 U.S. 157 (1912), *Coffey v. Harlan County*, 204 U.S. 659 (1907)). It is the duty of the executive to bring to justice those who commit crimes and it is the duty of the judiciary to assure that the accused receives due process and equal protection of the law. Just as the Constitution of the United States contemplates capital punishment, so does the Constitution of North Carolina expressly provide therefor. (See U.S. Constitution, Amendment V.; N.C. Constitution, Article 11, Section 2.)

CONCLUSION

The State of North Carolina, respondent, respectfully requests of this Court that it deny the petitioner's Petition for Writ of Certiorari to the Supreme Court of North Carolina.

This the 11th day of February, 1975.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he is an Assistant Attorney General licensed to practice law in the State of North Carolina and the United States Supreme Court.

That on February 7, 1975, he served a copy of the attached RESPONSE OF THE STATE OF NORTH CAROLINA TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA to the person hereinafter named, at the place and address stated below by depositing said envelope and its content in the United States mail at Raleigh, North Carolina:

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